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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT PETZEL, Defendant and Appellant.	B217404 (Los Angeles County Super. Ct. No. VA104564)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason C. Tran and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress evidence (Pen. Code, § 1538.5), defendant Robert Petzel was convicted by a jury of possession of methamphetamine for sale (count 1) and misdemeanor possession of marijuana (count 2). (Health & Saf. Code, §§ 11378, 11357, subd. (b).)[1] In this appeal from the judgment, defendant challenges the denial of his motion to suppress evidence. Finding no error, we affirm.

BACKGROUND

Prior to his jury trial, defendant moved to suppress the evidence that was recovered during the warrantless search of his car. The search was conducted after Los Angeles County Sheriff's Deputy Richard Velasquez detected the odor of marijuana coming from the open door of the car, which was in a motel parking lot.

At the suppression motion hearing, Velasquez testified as follows. On February 8, 2008, at approximately 12:50 a.m., Velasquez and his partner drove their marked patrol car into the parking lot of a Motel 6 in Norwalk, which was a known location for high narcotics activity. Defendant was standing in the parking lot and leaning into the window of a car that belonged to Jan-Michael Tapales, who was seated in the driver's seat of the car. As the deputies pulled up behind Tapales's car, defendant looked up and appeared startled before he immediately turned and walked toward his own car, which was parked one empty space from Tapales's car.

Based on his training and experience, Velasquez believed that defendant and Tapales were engaged in the possible sale of narcotics. Velasquez exited the patrol car, which was parked behind Tapales's car, and walked toward defendant, who was standing next to the open door of his car and was about to get into his car. As Velasquez walked up and "contacted" defendant, Velasquez smelled "the odor of marijuana coming from the interior of the vehicle."

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1 As to count 1, the trial court stayed the imposition of sentence and placed defendant on formal probation for three years with 360 days time served in county jail. On count 2, the trial court imposed and stayed a fine of $150.

Velasquez testified that he smelled the odor of marijuana "[w]hen I contacted him at his vehicle. I walked over to his vehicle, [where he was] standing with the door open by the driver's side of his vehicle. [¶] Q Did you say something to him first or smelled the marijuana first? [¶] A I said something to him first. [¶] And the words were? [¶] A Can you stop? I need to talk to you for a minute. [¶] Q How did you know it was marijuana you were smelling? [¶] A 'Cause marijuana has a strong, pungent odor that was kinda unmistakable."

After detecting the odor of marijuana, Velasquez detained defendant, who was searched and placed in the back seat of the patrol car. A search of defendant's vehicle resulted in the discovery of two baggies of methamphetamine in a storage slot above the car radio, a baggie of marijuana in the driver's side door panel, a box containing another baggie of marijuana, approximately a hundred small ziplock storage baggies, and a digital scale on the floorboard of the car.

Tapales testified for the defense at the suppression motion hearing. Tapales testified that when the deputies drove into the parking lot, they parked their patrol car behind Tapales's car, which prevented Tapales from leaving. The deputies searched Tapales's car, but found no drugs. The deputies had to use defendant's keys to open defendant's car doors, which were closed and locked, in order to search defendant's car. Tapales did not smell any odor of marijuana coming from inside defendant's car.

In support of the suppression motion, defendant argued that he was detained from the moment the deputies parked behind Tapales's car and told him to stop. Defendant contended that the deputies had no reasonable suspicion that drugs were being sold: "They didn't see any money, they didn't see a transfer of any items. They didn't see anything but conversation between two grown men . . . near a car . . . ." Defendant pointed out that Velasquez's version of events was contradicted by Tapales's testimony that he did not smell any marijuana and that defendant's car doors were closed and locked.

In opposition to the suppression motion, the prosecution argued that "there was no detention . . . until after the deputy smelled the marijuana," which gave the deputies

"sufficient probable cause to search" defendant's car. The prosecution alternatively argued that assuming defendant was detained when he was asked to stop, there were "articulable facts for reasonable suspicion: They're in a high narcotics traffic area close to 1:00 o'clock in the morning, and they see what they interpret to be — reasonably believe to be a narcotics transaction, or rather, they believe that they interrupted that transaction."

The trial court denied the suppression motion on the ground that defendant was not detained until after the odor of marijuana was detected, which occurred "simultaneously" with the deputy's request to speak with defendant. Alternatively, the trial court found that the deputies had a reasonable basis to detain defendant even before the odor of marijuana was detected: "This was [an] alleged high narcotic area; it was 1:00 o'clock in the morning; it was specifically a hotel this officer's indicated there are a lot of drug sales that go on; the defendant is engaging in activity, which although it could be construed as being legal activity, at the same time it could also be viewed as activity indicating a . . . drug transaction." As for Tapales's testimony, the trial court found that he was not a credible witness "by any stretch of the imagination."

DISCUSSION

In reviewing the denial of a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Garry* (2007) 156 Cal.App.4th 1100, 1106.)

Defendant contends that he was unlawfully detained when the deputies parked their patrol car behind Tapales's car and asked him to stop. He relies on cases such as *People v. Bailey* (1985) 176 Cal.App.3d 402, 404-406, in which the defendant was approached by officers in a patrol car with its emergency lights flashing; *People v. Jones* (1991) 228 Cal.App.3d 519, 523, in which the defendant was approached by an officer

who had pulled his patrol car to the wrong side of the road and parked diagonally against traffic; *People v. Wilkins* (1986) 186 Cal.App.3d 804, 809, in which the defendant's vehicle was physically blocked by the patrol car; *People v. Garry, supra,* 156 Cal.App.4th at page 1112, in which the deputies had fixed a spotlight on the defendant while asking about his legal status; and *People v. Verin* (1990) 220 Cal.App.3d 551, 557, in which the defendant was told, "'Hold on. Police[]' or 'Hold it. Police.'"

There are several factors that distinguish this case from those cited above. Here, the patrol car's emergency lights were not flashing and it was not parked in a manner that blocked or impeded defendant's car from leaving the parking lot. (See *People v. Perez* (1989) 211 Cal.App.3d 1492, 1496 [defendant was not detained when officers parked their patrol car in front of defendant's vehicle and left room for defendant's vehicle to leave].) And in this case, the deputy did not issue a command such as "'Hold on, Police'" (*People v. Verin, supra,* 220 Cal.App.3d at p. 557), but made a request, "Can you stop? I need to talk to you for a minute." (See *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [consensual encounters do not violate the Fourth Amendment and a detention does not occur when a police officer merely approaches an individual and asks a few questions].)

The most significant factor is that in this case, the deputy detected an odor of marijuana while walking in a location where he was entitled to be present. The trial court expressly found that the deputy's request to speak with defendant and the deputy's detection of the odor of marijuana were simultaneous events. In making this factual determination, which defendant does not challenge in his opening brief,[2] the trial court

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2 In his reply brief, defendant challenges for the first time the sufficiency of the evidence to support the trial court's finding that the events had occurred simultaneously. We conclude that the issue has been waived. Where a criminal defendant raises an issue for the first time in a reply brief on appeal, the issue will not be considered unless good reason is shown for the failure to present it before. (*People v. Senior* (1995) 33 Cal.App.4th 531, 537; *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) In any event, defendant points to Velasquez's statement that he spoke to defendant before smelling the marijuana and concludes the alleged detention preceded the deputy's

implicitly found there was no nexus between the purportedly unlawful detention and the inevitable discovery of the disputed evidence. (See *Nix v. Williams* (1984) 467 U.S. 431 [adopting inevitable discovery doctrine]; *People v. Superior Court* (*Walker*) (2006) 143 Cal.App.4th 1183, 1214 [evidence found during warrantless search of defendant's room was admissible because it inevitably would have been discovered].)[3]

Given that the deputy was lawfully present in the parking lot when he detected the odor of marijuana coming from inside defendant's vehicle, there can be no dispute on this record that there was probable cause to search the vehicle that was independent of any allegedly unlawful detention. (See *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059 [deputy had probable cause to search defendant's car for marijuana after smelling the odor of marijuana].) Accordingly, the motion to suppress evidence was properly denied.

DISPOSITION

The judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J. WILLHITE, J.

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awareness of the odor. This ignores Velasquez's testimony that "[He] was saying these things [asking defendant to stop] as [he] was walking towards him."

3 Under the inevitable discovery rule, evidence that "otherwise would be inadmissible as the fruit of the poisonous tree" will not be excluded if "there is a reasonably strong probability that the evidence would have been discovered by lawful means independent of the illegality." (*Hernandez v. Superior Court* (1980) 110 Cal.App.3d 355, 364.)